Impact Analysis Statement

Summary IAS

Details

Lead department	Department of Justice
Name of the proposal	Trusts Bill 2025
Submission type (*Summary IAS / Consultation IAS / Decision IAS)*	Summary IAS
Title of related legislative or regulatory instrument	Trusts Bill 2025
Date of issue	February 2025

Proposal type	Details
Minor and machinery in nature	Except as set out below, the Trusts Bill 2025 **(the Bill)** is machinery in nature, does not substantively change regulatory policy or introduce new impacts on business, government, or the community and merely modernises the existing *Trusts Act 1973* **(the Act).**

Proposal 1 - The approval of cy pres applications in relation to charitable trusts by the Attorney-General

What is the nature, size and scope of the problem? What are the objectives of government action?
If a charitable trust is no longer capable of fulfilling its intended purposes, or a gift for a charitable purpose becomes impossible to effect, under common law, a court may order that the property of the charitable trust be applied *cy pres* (which in plain English means: "as nearly as possible") for another charitable purpose that is as close as possible to the intended purposes of the original charitable purpose. A separate statutory procedure is provided for under the Act in section 105 which allows the Supreme Court to order that the property of a charitable trust be applied *cy pres* in a wider set of circumstances. The costs of making an application to the Supreme Court to apply for an order for a *cy pres* scheme are significant and may deplete or significantly reduce the trust funds available to meet this charitable purpose, which is undesirable. The Queensland Law Reform Commission (QLRC) in its discussion paper *A review of the Trusts Act 1973* (Qld) (WP No 70 - December 2012) (**the Discussion Paper**) noted that, under general law, the Attorney-General, representing the objects of the charity, has a right and duty to assist the court in the formulation of a *cy pres* scheme for the execution of charitable trusts but has no independent authority to change the destination of a trust fund against the will of the testator (see paragraph 13.27). However, the QLRC noted (from paragraphs 13.29 to 13.36 of the Discussion Paper) that many other Australian jurisdictions, including Victoria, New South Wales, South Australia, Tasmania and Western Australia empower the Attorney-General in particular circumstances to approve *cy pres* schemes for the variation of the purposes of charitable trusts if the value of the property does not exceed the prescribed amount which varies from $500,000 in New South Wales to $100,000 in Western Australia (or for Western Australia, the income for the trust for the previous financial year is less than $20,000).

After receiving primarily positive feedback on this issue, the QLRC recommended in its *Interim Report – A review of the Trusts Act 1973* (WP No 71 - June 2013) and *Final Report – A review of the Trusts Act 1973* (Report 71 December 2013) (**the QLRC Reports**) that the Attorney-General be given power to approve *cy pres* schemes subject to a right of appeal to the Supreme Court.

The Bill, at part 12, division 3, subdivision 3, adopts this recommendation by granting the Attorney-General the power to determine a *cy pres* scheme involving a charitable trust with trust property up to the monetary limit of the civil jurisdiction of the District Court (which is currently $750,000). There is also a right of appeal to the Supreme Court from this determination.

What options were considered?

The options considered were maintaining the status quo so that any *cy pres* application has to be made to the Supreme Court with the costs and time associated with these applications or, like other jurisdictions in Australia, giving the power to the Attorney-General to make a determination for charitable trusts with funds up to a certain limited amount.

What are the impacts?

Empowering the Attorney-General to make a determination with respect to *cy pres* applications in smaller charitable trusts will decrease the costs imposed on these charitable trusts and maximise the value of the trust property which is available to satisfy charitable purposes. There will be a reduction in the burden on smaller charitable trusts that will be able to make application for *cy pres* to the Attorney-General rather than the Supreme Court.

This will divert these applications from the Supreme Court to the Attorney-General but the Attorney-General already plays a significant role in advising the court on the proposed *cy pres* applications. Accordingly, the work in determining these applications is unlikely to be significantly different from the work already carried out by the Attorney-General in assisting the court in assessing these applications.

Further, even if there is any additional regulatory burden on the Attorney-General, there are a very limited number of *cy pres* applications brought each year before the court, so the likelihood is that any impact on the Attorney-General will be minimal and certainly not substantial. It is understood that there are on average 10 applications or so made each year to the Supreme Court.

Who was consulted?

The QLRC consulted broadly with legal and trust sector stakeholders and the general public in relation to the Discussion Paper and the QLRC Interim Report. Further, a consultation draft of the Trusts Bill 2024 (lapsed Bill) (which was substantially similar to the Bill, but lapsed when the 57th Parliament was dissolved ahead of the 2024 statewide general election) was subject to broad based targeted and public consultation. Most stakeholders were supportive of the proposed amendments.

What is the recommended option and why?

The recommended option is in the Bill, at part 12, division 3, subdivision 3, granting the Attorney-General the power to determine an application for a *cy pres* scheme involving trust funds up to the monetary limit of the civil jurisdiction of the District Court of Queensland (which is currently $750,000). There is also a right of appeal to the Supreme Court. This option reflects the expertise of the Attorney-General as protector of charitable trusts and provides cost-effective access to justice for charitable trusts to maximise the trust property available to meet charitable purposes.

Proposal 2 – Core duties applied to a trustee

What is the nature, size and scope of the problem? What are the objectives of government action?

The Act currently does not set out any of the core duties of trustees other than duties in relation to investments made by trustees. However, the law of trusts is not codified by the Act and is found principally in the case law, including the law relating to trustees' duties, which can create a lack of certainty about trustees' duties.

The Bill sets out core duties that apply to a trustee to set minimum standards which a trustee should meet. This improves clarity about trustees' core duties and does not limit the application of, or the development of, the case law in relation to specific or new duties.

What options were considered?
The QLRC in its Discussion Paper considered trustees' duties in Australia under the general law at paragraphs 7.9 to 7.42. The QLRC reviewed other jurisdictions which have included general statutory duties on trustees in law reform (including England, the United States of America, Canada, Ireland and Scotland), Commonwealth legislation relating to superannuation fund trustees and feedback from the Discussion Paper. The QLRC Reports proposed a general statutory duty of care, a duty to act honestly and in good faith, and a duty to keep records and accounts, maintain these for at least three years after termination of the trust and provide accounts to beneficiaries on request, on receiving payment of any reasonable costs for providing any copies.
What are the impacts?
The duties set out in the Bill will not substantially change the existing law or add additional costs but will impose minimum statutory duties on trustees in line with existing duties under common law. In the case of the obligation to keep records for a minimum period on termination of the trust, the Bill adds a specific, reasonable minimum timeframe of three years that balances the impost on trustees with the rights and needs of beneficiaries.
Who was consulted?
The QLRC consulted broadly with legal and trust sector stakeholders and the general public in relation to the Discussion Paper and the QLRC Interim Report. Further, a consultation draft of the lapsed Bill was subject to broad based targeted and public consultation. Stakeholders were broadly supportive of the proposed amendments.
What is the recommended option and why?
The recommended option is as set out in part 5 of the Bill which includes a general statutory duty of care (which is higher for professional trustees or those who hold themselves out as having special expertise), a duty to act honestly and in good faith, to keep records and accounts and maintain these for at least three years after termination of the trust, and to provide accounts to beneficiaries on request on receiving payment of any reasonable costs for providing any copies. This provides clarity and certainty for trustees and beneficiaries and ensures that there are minimum statutory duties imposed. The three-year period is a minimum statutory retention period and there are other legislative obligations which may require a trustee to retain records for a longer period and general duties on trustees which similarly may require records to be retained for a longer period.

Proposal 3: Conferral of jurisdiction on the District Court within its jurisdictional monetary limit

What is the nature, size and scope of the problem? What are the objectives of government action?
The QLRC Discussion Paper noted that the Victorian County Court (which is the equivalent of the Queensland District Court) had been given concurrent jurisdiction for trusts matters with the Supreme Court to assist in reducing delays and improving access to justice. The District Court already has wide jurisdiction up to the District Court's monetary limit of $750,000 to hear and determine various actions or matters with regard to trusts and in exercising that jurisdiction has all the powers and authorities of the Supreme Court (sections 68 and 69 of the *District Court of Queensland Act 1967* (DCQ Act)). However, the Act only provides the Supreme Court with jurisdiction to deal with applications under the Act. The costs of making an application to the Supreme Court are significant.
What options were considered?
The QLRC in its Discussion Paper (see chapter 15) considered extending the jurisdiction of the Supreme Court under the Act to the District Court, the Magistrates Courts and the Queensland Civil and Administrative Tribunal. Given the highly technical and specialised area that is trusts law, and the judicial expertise required, the QLRC Reports recommended that this jurisdiction only be extended to the District Court which is in keeping with the gradual extension of the District Court's jurisdiction.

What are the impacts?
Extending jurisdiction to the District Court is anticipated to reduce the costs for the administration of trusts and thereby increase the trust funds available for use for the trust's purpose (if charitable) or otherwise for distribution to trust beneficiaries because the costs associated with an application to the District Court are lower. Additionally, extending jurisdiction to the District Court will divert applications from the Supreme Court to the District Court.
Who was consulted?
The QLRC consulted broadly with legal and trust sector stakeholders and the general public broadly in relation to the Discussion Paper and the QLRC Interim Report. Further, a consultation draft of the lapsed Bill was subject to broad based targeted and public consultation. Stakeholders were broadly supportive of the proposed amendments.
What is the recommended option and why?
The recommended option (as reflected in the definition of 'court' in Schedule 1 of the Bill and the amendments to the *District Court of Queensland Act 1967* in the Bill) is that the District Court should have the same powers as the Supreme Court under the Bill in cases where an application relates to a trust or trust property, the value of the trust or trust property does not exceed the District Court's monetary limit (currently $750,000) or for any other application under the Bill if the value of the property which is the subject of the application does not exceed the District Court's monetary limit. This is consistent with the gradual extension of the District Court's jurisdiction to equitable matters over time and the expertise which has developed in this area in the District Court whilst ensuring cost effective access to justice for trusts, trustees, and the beneficiaries of trusts.

Proposal 4: Review and reduction of trustee's excessive commission and professional charges

What is the nature, size and scope of the problem? What are the objectives of government action?
Section 101 of the Act allows the Supreme Court to authorise remuneration for a trustee and also to provide for charging of fees by a trustee. There are similar provisions providing for commission for the Public Trustee under the *Public Trustee Act 1978* and licensed trustee companies under the *Corporations Act 2001* (Cth). However, concerns have been raised that professional trustees or personal representatives may sometimes charge remuneration at higher rates than might be authorised on application by the court. As noted in the QLRC's Discussion Paper at paragraphs 12.146 to 12.152, this concern could be addressed by adopting a provision similar to section 86A of the *Probate and Administration Act 1898* (NSW), as was recommended in the QLRC, *Administration of Estate of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report No 65 (2009), Volume 3, at paragraph 27.128. This would also reflect provisions in the *Corporations Act 2001* (Cth) which allow the court to review the fees charged by licensed trustee companies.
What options were considered?
The options which were considered included the status quo (i.e. no ability for the court to review and reduce excessive charges or remuneration for trustees), giving the court the ability to review and reduce excessive trustee's fees for all trustees, or giving the court the ability to review and reduce excessive trustee's fees for trustees generally, subject to exceptions for those trustees that are governed under other legislation such as the Public Trustee, and licensed trustee companies.
What are the impacts?
The proposal may increase the burden on courts to determine applications to review and reduce a trustee's charges or commission. However, it may also provide protection for beneficiaries of trusts by providing a right of redress through the courts for excessive charges or commission by trustees.
Who was consulted?
The QLRC consulted broadly with legal and trust sectors and the general public in relation to the Discussion Paper and the QLRC Interim Report. Further, a consultation draft of the lapsed Bill was subject to broad based targeted and public consultation. Stakeholders were broadly in favour of giving the court the ability to review and reduce trustee's charges or commission.

What is the recommended option and why?
The Bill gives the court the ability to review and reduce excessive trustee's fees for trustees generally, subject to exceptions for the Public Trustee, where the fees and charges are charged or proposed to be charged under section 17 of the *Public Trustee Act 1978,* and licensed trustee companies under section 9 of the *Corporations Act 2001* (Cth). This extends the court's inherent jurisdiction in equity and oversight of trusts by providing a suitable discretion to the court to protect the trust and the beneficiaries of the trust from harm in the form of excessive charges by the trustee.

Proposal 5: Court's Disqualification of Trustees

What is the nature, size and scope of the problem? What are the objectives of government action?
As noted in the QLRC's Interim Report at paragraphs 12.20 to 12.25, the Act does not empower the court to disqualify a person who is removed as trustee from acting as a trustee of other trusts. However, there is provision in federal legislation for directors of corporations (including licensed trustee companies) and trustees of superannuation entities to be disqualified under the *Corporations Act 2001* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth).
What options were considered?
The options considered were maintaining the status quo so that there was no power for the court to disqualify a trustee, or a new provision where the court, in very limited circumstances, may make an order disqualifying a person from being appointed as a trustee for any kind of trust for the period stated in the order if the court has replaced or removed the person as a trustee and is satisfied that the person has committed one or more breaches of trust and that the nature and seriousness of those breaches render the person unfit to act as a trustee.
What are the impacts?
A disqualification order may only be made as part of existing proceedings for the removal of a trustee from a trust and so will not add to the matters before the court. However, it may require additional consideration by the court about whether a disqualification is appropriate based on an assessment of the conduct leading to the removal of the trustee in the very limited number of cases brought before the court for removal of a trustee which are successful in having the trustee removed, and in the even more limited number of matters where circumstances exist which are in the court's view sufficient to warrant a disqualification order being made. Any impact on the courts is likely to be minimal and certainly not significant.
Who was consulted?
The QLRC consulted broadly with legal and trust sector stakeholders and the general public in relation to the QLRC Interim Report. Further, a consultation draft of the lapsed Bill was subject to broad based targeted and public consultation. The majority of stakeholders were in favour of giving the court the ability to disqualify a trustee, who has been removed or replaced as a trustee of a trust, from being a trustee of any other trust.
What is the recommended option and why?
The recommend option is to give power to the court to disqualify a trustee, who has been removed or replaced as a trustee of a trust, from being a trustee of any other trust for the period stated in the order. This power would be enlivened if the court has replaced or removed the person as a trustee and is satisfied that the person has committed one or more breaches of trust and that the nature and seriousness of those breaches render the person unfit to act as a trustee. This appropriately limits a settlor's or appointor's discretion to appoint a disqualified person as a trustee to protect the trust and its beneficiaries.

Proposal 6: Persons who cannot be trustees

What is the nature, size and scope of the problem? What are the objectives of government action?

The Act (section 12) does not restrict who can be appointed as a trustee but instead provides a mechanism for the removal and replacement of trustees should the need arise. The circumstances where a trustee can be removed and replaced include where a trustee is incapable of acting, is an infant or is insolvent. It follows that parties with limited legal capacity, such as minors, can be appointed as trustee until they are removed, which may impact on the administration of the trust. Third parties may be unwilling to engage with these (incapacitated) trustees and it may impact on the capacity of the trustee to defend or initiate litigation or enter into commercial arrangements.

The current Queensland position contrasts with legislation in the Australian Capital Territory (*Trustee Act 1925* (ACT), section 7A), New South Wales (*Conveyancing Act 1919* (NSW), section 151A) and the United Kingdom (*Law of Property Act 1925*, 15 & 16 Geo 5, c 20, s 20) which provide for the appointment of a minor as trustee to be void.

What options were considered?

Options which were considered include:

(a) For minors:
- maintaining the status quo so that they are able to be appointed but are liable to be removed;
- their appointment is void unless it is an appointment conditional on the minor attaining their majority – in which case the appointment would take effect at a future point in time; or
- their appointment is void;

(b) For insolvent trustees:
- for individuals, their appointment is void if they are insolvent (which is broadly defined to include a person who is unable to pay their debts as and when they fall due);
- for individuals, their appointment is void if they are an insolvent under administration;
- for corporations, their appointment is void if the corporation is insolvent, depending on whether this should be broadly defined (to include a corporation that is unable to pay its debts as and when they fall due) or more narrowly defined to include one that is in liquidation or is under external administration;

(c) for disqualified trustees, that their appointment is void.

It was also considered whether, for some of these appointments, the restriction should be subject to a contrary intention in the trust deed or court order (for example, in the case of insolvent corporations).

What are the impacts?

The proposed reform limits who the settlor may appoint as trustee of the trust, which may require settlors to consider alternative trustees. However, it will ensure that a trust is able to be efficiently administered and appropriately protect the interests of the trust, the beneficiaries and potential trustees by preventing trustees with capacity issues being appointed as trustees.

Who was consulted?

The QLRC consulted broadly with legal and trust sector stakeholders and the general public in relation to the Discussion Paper and the QLRC Interim Report. Further, a consultation draft of the lapsed Bill was subject to broad based targeted and public consultation Stakeholders were broadly supportive of the proposal.

What is the recommended option and why?

The Bill prevents the following from being appointed as a trustee: a minor; a 'Chapter 5 body corporate' as defined under section 9 of the *Corporations Act 2001* (Cth); an individual who is an insolvent under administration ; and a person who has been disqualified from being appointed as a trustee (as they have been determined as unfit to act as trustee by a court order under the Bill). This restriction limits the freedom of choice of the settlor in whom they can appoint as trustee but will ensure that the trust is able to be effectively administered and that the trustee appointed is both capable, and suitable, to act as trustee of the trust which protects the interests of the trust and the beneficiaries of the trust.

Proposal 7: Appointment of trustee by administrator or attorney of last continuing trustee with impaired capacity

What is the nature, size and scope of the problem? What are the objectives of government action?
On the last continuing trustee losing capacity to administer the trust, the trust is effectively 'in limbo' until a new trustee is appointed. If the trust instrument does not provide for a mechanism for the appointment of a new trustee, or where the person or persons with the power of appointment is unable or unwilling to act to appoint a new trustee, an urgent application to the court to appoint a new trustee will be required. Such an application would incur significant costs and reduce the trust property available for distribution between the beneficiaries of the trust. The Act enables the personal representative of the last surviving trustee to appoint a new trustee, if the last trustee has died, but does not deal with the incapacity of the last remaining trustee to administer the trust.
What options were considered?
The QLRC's Discussion Paper (discussed at pages 68-79) considered a variety of options including: (a) maintaining the status quo and requiring a court application to appoint a new trustee; or (b) giving the power to appoint a new trustee to: - the beneficiaries of the trust; or - the administrator, or attorney for financial matters (under an enduring power of attorney), of the last surviving trustee who no longer has capacity to administer the trust. After consideration of feedback, and noting that it was finely balanced between stakeholders' differing views, the QLRC's Reports (at pages 28 to 32 of the Final Report and pages 44-53 of the QLRC Interim Report) recommended that, if the last surviving trustee no longer has capacity to administer the trust, an administrator of the trustee under the *Guardianship and Administration Act 2000* or another corresponding law of another Australian jurisdiction, or the attorney for financial matters for the trustee under an enduring power of attorney made, or recognised, under the *Powers of Attorney Act 1998*, be able to appoint a new trustee. The administrator or attorney would be exercising the power of appointment in their quasi-fiduciary role as appointor under the trusts legislation and would not be acting in their capacity under the relevant guardianship or attorney legislation. After targeted consultation on the provision in the lapsed Bill, the option to have the power to appoint a new trustee by the administrator or attorney to be subject to a contrary intention in the trust instrument or in the order or instrument by which the administrator or attorney is appointed was also considered.
What are the impacts?
This proposed reform is intended to reduce the delay and costs for the trust and its beneficiaries if the last continuing trustee has lost capacity and there is no available mechanism under the trust instrument, or person willing and able to exercise the power of appointment or use the mechanism in the trust instrument, to appoint a new trustee, and to enable the efficient cost-effective administration of the trust. The proposed reform may have the potential to increase trust disputes and lead to court applications if beneficiaries are concerned about the trustee appointed by the administrator or attorney, particularly if the administrator or attorney appoints themselves, and they have no connection with, or personal knowledge of, the trust, or if the new trustee also may have an interest in the trust as a potential beneficiary. Some stakeholders were concerned about a potential conflict between the duties that apply to an administrator or attorney under their respective governing Acts, and the duties that would apply to an administrator or attorney exercising a power of appointment under the provisions of the Bill. The Bill has been drafted to address that issue.
Who was consulted?
The QLRC consulted broadly with legal and trust sector stakeholders and the general public in relation to the Discussion Paper and the QLRC Interim Report. Further, a consultation draft of the lapsed Bill was subject to broad based targeted and public consultation. However, stakeholders were fairly evenly divided in supporting and not supporting this proposed reform.
What is the recommended option and why?
The Bill enables the attorney or administrator appointed for all financial matters (or if more than one is appointed, then all jointly) of the last continuing trustee who has impaired capacity to administer the trust,

to appoint a replacement trustee if there is no appointor of the trust (or no appointor who is willing and able to act), or any other mechanism under the trust instrument to appoint a replacement trustee has not been utilised within a reasonable time period of the later of the last continuing trustee having impaired capacity to administer the trust or becoming the last continuing trustee.

The Bill provides that this power of appointment to appoint a new trustee is not made by the attorney or administrator in their capacity as administrator or attorney of the last continuing trustee and neither the *Guardianship and Administration Act 2000* nor the *Powers of Attorney Act 1998* applies in relation to the exercise of the power of appointment. Further, this power applies subject to a contrary intention in the trust instrument or any terms of the order or appointment by which the administrator or attorney is appointed. Persons wishing to challenge the appointment made may still apply to the court in the event of a dispute.

Proposal 8: Appointment of trustee by last continuing trustee who is insolvent under administration

What is the nature, size and scope of the problem? What are the objectives of government action?

If the last continuing trustee is an insolvent under administration, the insolvent trustee may need to be urgently replaced. Unless a replacement trustee is appointed by the appointor, or by another mechanism provided for under the trust instrument to appoint a new trustee, the trust is effectively 'in limbo' administratively until a new trustee is appointed. If the trust instrument does not provide for a mechanism for the appointment of a new trustee, or if the person or persons with the power of appointment is unable or unwilling to act to appoint a new trustee, an urgent application to the court may be required to appoint a new trustee. Such an application would incur significant costs and reduce the trust property available for distribution between the beneficiaries of the trust.

The Bill enables the last continuing trustee who is an insolvent under administration to appoint a replacement trustee in this instance.

What options were considered?

A variety of options were considered including:

(a) maintaining the status quo and requiring a court application to appoint a new trustee; or

(b) giving the power to appoint a new trustee to:

- the beneficiaries of the trust; or
- the insolvent last continuing trustee.

After targeted consultation on the lapsed Bill, the option to have the power to replace the trustee by the insolvent last continuing trustee, subject to a contrary intention in the trust instrument, was also considered.

What are the impacts?

The proposed reform is intended to reduce the delay and costs for the trust and its beneficiaries enabling the last continuing trustee who is an insolvent under administration to be replaced notwithstanding that there is no appointor (or no appointor willing and able to act), or no available mechanism under the trust instrument which has been exercised, to replace the last continuing trustee who is an insolvent under administration to enable the efficient cost-effective administration of the trust.

Who was consulted?

A consultation draft of the lapsed Bill was subject to broad based targeted and public consultation. Stakeholders were broadly supportive of the proposal.

What is the recommended option and why?

The Bill enables the insolvent last continuing trustee to appoint a replacement trustee if there is no appointor of the trust (or no appointor who is willing and able to act) or if any other mechanism under the trust instrument to appoint a replacement trustee has not been utilised within a reasonable time of the later of the last continuing trustee becoming insolvent or becoming the last continuing trustee.

Impact assessment

The impacts are qualitatively described above under each individual proposal. Overall, the proposals are expected to reduce costs, but these are unable to be estimated due to limited information on the number of

trusts that would make use of the proposals and the legal and other resources parties would use under the proposals.

All proposals – complete [do not delete]:

	First full year	First 10 years**
Direct costs – *Compliance costs**	Not Applicable	Not Applicable
Direct costs – *Government costs*	Not Applicable	Not Applicable

Signed

Acting Director-General
Department of Justice

Date: 01/02/2025

Attorney-General and Minister for Justice
and Minister for Integrity

Date: 04/02/2025